



## Litigation Backgrounder

### Fighting Federal Overreach under the Endangered Species Act (*People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service, et al.*)

*“If Congress could use the Commerce Clause to regulate anything that might affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause.”<sup>1</sup>*

The basic premise of the United States Constitution is that the federal government it creates has only a few limited and enumerated powers. The remaining responsibilities of government fall on the states. The United States Supreme Court has explained that the purpose behind this design was to protect individual liberty: “[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”<sup>2</sup> “When government acts in excess of its lawful powers, that liberty is at stake.”<sup>3</sup> Regrettably, the federal government has upset this balance by aggrandizing power far beyond the limits that the Founders imposed on it. The courts have been largely complicit in this unconstitutional expansion of federal power, only enforcing limits on federal power in a few instances since the 1930s. The federal government has been most aggressive in expanding its power under the Commerce Clause, to the point where noted judge Alex Kozinski once “wonder[ed] why anyone would make the mistake of calling it the Commerce Clause instead of the ‘hey-you-can-do-whatever-you-feel-like clause.’”<sup>4</sup>

The Endangered Species Act is one of the most oppressive examples of this federal overreaching. It threatens anyone who does anything that harms any protected species or its habitat with imprisonment and huge criminal and civil fines. On April 18, 2013, Pacific Legal Foundation (PLF) filed a federal lawsuit on behalf of People for the Ethical Treatment of Property Owners challenging the constitutionality of a federal regulation that forbids them from doing anything that might harm the Utah prairie dog without first getting permission from Washington bureaucrats. On November 4, 2014, the District Court for the District of Utah ruled in the organization’s favor. This backgrounder explains why this fight is critical to reigning in the federal government and ensuring proper respect for property rights and individual liberty.

## **People for the Ethical Treatment of Property Owners**

People for the Ethical Treatment of Property Owners<sup>5</sup> was formed by private property owners and residents of southwestern Utah who had suffered for far too long under burdensome regulations to protect the Utah prairie dog, suffering which was ignored by the federal government causing it. The organization's more than 200 members have been denied the freedom that most Americans take for granted. They are forbidden from using their private property, building homes, starting businesses, and protecting their community from the maleffects of a large and ever growing rodent population.

Some of the organization's members own lots in residential subdivisions that they'd like to develop into single family homes. Even though their neighbors were able to build, they had the misfortune of having Utah prairie dogs take over their property before they began construction. As a consequence, their land is unusable and their hopes shattered.

Others want to build small businesses to better provide for themselves and their families. Bruce Hughes, for instance, owned an investment lot that he wished to develop to provide for his retirement. Unfortunately for him, prairie dogs moved in first. He was told that the only way he could get his property back was to wait decades for the required permits or pay the government \$34,000. He says "if I didn't pay ... and I killed one prairie dog. It would be a \$10,000 fine and five years in federal prison. I could rob my local convenience market and get off easier than that."

Even the local government is hamstrung by this regulation. It is unable to keep the rodents off the fields where resident children play. To prevent injury from the rodent's tunnels and burrows, areas must be fenced off from the children. Utah prairie dogs have also invaded the municipal airport. They tunnel around and beneath the runway and other areas where flat, undisturbed earth is essential to safety.

The most heartbreaking example of the federal regulations burdens has been felt by those who have loved ones buried at the Cedar City Cemetery. What is supposed to be a sacred and serene space has been inexcusably disturbed by the Utah prairie dog. The rodents bark during funerals, dig amongst grave sites, and eat any flowers that loved ones leave at headstones. For instance, Brenda Webster and her family carefully selected a final resting place for her late husband, with a view of the surrounding mountains and foliage. A few days after he was laid to rest, she discovered, to her horror, prairie dogs disturbing her husband's gravesite.

## The Endangered Species Act

All of this has been caused by a regulation adopted under the Endangered Species Act. That regulation forbids anyone from doing anything that could disturb the prairie dogs or their habitat without government approval.<sup>6</sup> And, despite the fact that the species population has grown substantially, the government recently *restricted* the number of areas where these permits are potentially available.

The regulation borrows the Endangered Species Act's prohibition against "take" of a protected species which is defined broadly as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."<sup>7</sup> The agencies that enforce this prohibition have interpreted this expansively to encompass habitat modification or degradation and unintended and indirect harms.<sup>8</sup> The nature of the activity is irrelevant – commercial activities are treated the same as a family building a home, a surfer getting within five football fields of a whale,<sup>9</sup> and a youth who throws rocks at a protected species. Despite the abundance of innocent activities that can run afoul of this prohibition, the penalties are harsh: up to \$25,000 in civil fines, \$50,000 in criminal fines, and a year in prison for *each* organism harmed.<sup>10</sup> Thus a migrant farm worker who accidentally disked through a vernal pool containing a few dozen tiny fairy shrimp could be threatened with decades in prison and financial ruin. Even a jogger who accidentally steps on a protected beetle crossing her path would commit a crime under this statute.

## The Utah Prairie Dog

The Utah prairie dog was nearly decimated by eradication efforts, especially by the federal government, beginning in the 1920s. It has been regulated under the Endangered Species Act since the statute was adopted in 1973. Initially, it was listed as endangered but by 1984 it had recovered to the point where it could be downlisted.<sup>11</sup> With the downlisting, the U.S. Fish and Wildlife Service adopted a regulation allowing some permitted "take" of the species, subject to an annual cap.

The species has continued to recover, aided by agriculture and its move from wilderness into residential areas—both of which increases its access to food sources and reduces the prevalence of predators.<sup>12</sup> The main threat to the species is the plague, which sporadically infects prairie dog colonies.<sup>13</sup> They are not significantly threatened by human economic activity—they are not bought or sold and are not used in any commercial process. In 2010, the Service estimated the total population at just over 40,000, nearly double what it was when the species was downlisted from endangered to threatened. All of these animals are found in southwestern Utah.

Despite this population growth, the Service adopted a regulation in 2012 that restricted the availability of permits.<sup>14</sup> Now, many properties are wholly ineligible for

permits and those which are eligible are forbidden from fully addressing the impacts of the prairie dogs on their property.

### **The Federal Government Cannot Regulate Noneconomic Activity Under the Commerce Clause**

Since the 1930s, the courts have generally abdicated their responsibility to enforce the limits on the federal government's power under the Commerce Clause. This clause provides that Congress may "regulate Commerce ... among the several States."<sup>15</sup> The Founders understood this as the power to make commerce "regular," meaning that Congress could use it to preempt any state barriers to trade across state lines.<sup>16</sup> It was not a license to pervasively regulate all economic activity.<sup>17</sup> Though the Founders did not anticipate that any government would regulate economic activity to the extent that they now do, they understood any such authority to rest with the states.

The U.S. Supreme Court abandoned this original understanding of the Commerce Clause in a case called *Wickard v. Filburn*.<sup>18</sup> That case held that the federal government's Commerce Clause power extends to regulating a farmer who grew wheat for home consumption. The farmer argued that, because the wheat never left his farm, it could not be part of interstate commerce. The government responded, and the court agreed, that this power could reach any activity, such as the growing of wheat, which in aggregate has a substantial effect on interstate commerce. In effect, the federal government may regulate any economic activity.

And that is how the lower courts and legal scholars understood *Wickard* for fifty years. Alex Kozinski, a judge on the Ninth Circuit Court of Appeals, once described the holding as interpreting the Commerce Clause as "the 'hey-you-can-do-whatever-you-feel-like clause.'" The Supreme Court did not push back on this understanding until *United States v. Lopez*, a challenge to the constitutionality of the Gun Free School Zones Act's prohibition against the possession of a gun near a school.<sup>19</sup> The Court declared this federal crime unconstitutional, limiting Congress' power under the Commerce Clause to *economic* activity that has a *substantial* effect on interstate commerce. Mere possession of a gun is not an economic activity. And the government's "violent crime has a substantial effect on commerce" argument was a step too far—similar logic would justify federal regulation of *any* activity.

The Court revisited this issue in *United States v. Morrison*.<sup>20</sup> That case concerned the constitutionality of the Violence Against Women Act, which regulated domestic violence. Once again, the Supreme Court reiterated that the Commerce Clause concerns the regulation of *economic* activity. Violent acts are clearly distinguishable from the production, distribution, and consumption of commodities.<sup>21</sup> And the Court echoed its rejection of attenuated connections to commerce which could be used to justify federal regulation of anything.

Under *Lopez* and *Morrison*, the federal government cannot regulate *any* activity that harms *any* species. First, “take” is not economic activity. Like the regulations at issue in *Lopez* and *Morrison*, some incidences of the activity may be economic but the regulation does not regulate economic activity on its face. Rather, take broadly prohibits violent acts, like the law in *Morrison*, only those directed at listed species instead of women.

Utah prairie dog takes do not have a substantial effect on interstate commerce. The government has argued that there is a substantial effect because (1) the Utah prairie dog has biological value to its ecosystem, (2) there *may* be some tourism associated with the species, (3) scientists have studied the creature, and (4) there is a *possibility* of future commercial activity involving the species, *e.g.*, it could conceivably hold the cure for cancer.

Each of these arguments are too attenuated to withstand scrutiny and would justify unlimited federal authority. The ecosystem argument, for example, would go too far. All living things affect the ecosystem in some way.<sup>22</sup> Thus, accepting this argument would imply an unlimited federal power. The scientific study argument would also imply unlimited power, as just about anything could be the subject of academic research including, notably, guns and women—the subjects of the two cases finding no Commerce Clause authority. Similarly, the cancer argument must be rejected because, just as anything *could* hold the cure, any person *could* be the one who would find it. Yet the federal government cannot regulate anything that affects any person without giving it limitless power.

### **The Necessary and Proper Clause Does Not Permit the Federal Government to Comprehensively Regulate the Environment**

Because the Commerce Clause does not authorize the federal government to regulate any activity that harms a species, it can only be sustained, if at all, under the Necessary and Proper Clause. This clause provides federal power “to make all Laws which shall be necessary and proper for carrying into Execution” the other enumerated powers, including the Commerce Clause.<sup>23</sup> Like the Commerce Clause, this power is limited.

Since *McCulloch v. Maryland*, the Necessary and Proper Clause has been understood to give the federal government discretion in its choice of means to pursue “legitimate ends.”<sup>24</sup> But these ends are limited to the implementation of another enumerated power. The Supreme Court explained the scope of this power in *Gonzales v. Raich*, a case challenging federal authority to regulate mere possession of home-grown marijuana for medical use.<sup>25</sup> The Court upheld the government’s authority to regulate this noneconomic activity because, if the government could not regulate

intrastate production and possession, it would be frustrated in its efforts to regulate the interstate market for that commodity.

Thus, the federal government can only rely on the Necessary and Proper Clause to regulate activity which, if it was beyond its power, would frustrate a comprehensive regulatory scheme's ability to function *as a regulation of commerce*. In other words, if Congress could not regulate this activity, it could not effectively regulate economic activity or the market for a commodity. Generally, the federal government can pursue any legitimate public policy goal through a regulation of economic activity under the Commerce Clause. For instance, the Supreme Court has permitted the federal government to regulate crime and morality by regulating or prohibiting economic activity.<sup>26</sup> But it cannot rely on these general ends to extend its power under the Necessary and Proper Clause.

Thus, the Necessary and Proper Clause cannot grant the federal government authority to prohibit the take of any listed species for two reasons. First, the noneconomic activity being forbidden is wholly unnecessary to the regulation of any economic activity. For instance, the federal government's ability to regulate the agricultural industry would not be frustrated if it could not forbid children from throwing rocks at Utah prairie dogs.

Second, the Utah prairie dog is unrelated to the market for any commodity. It is not bought or sold and it is not used in any commercial process. Compare it to the bald eagle. There is an existing market for artifacts made from bald eagle feathers. Thus, activities affecting these creatures can be regulated as necessary to the protection and regulation of that market.<sup>27</sup> But the federal government's ability to regulate this market is not frustrated if it cannot regulate other, unrelated species.

The Utah prairie dog regulation could only be upheld by stretching the Necessary and Proper Clause beyond recognition. For example, the Fifth Circuit found federal authority to regulate take on the grounds that the Endangered Species Act is a comprehensive regulatory scheme to protect the "interdependent web" of *all* species.<sup>28</sup> But this rationale would eviscerate any limits on the federal government's powers. People are part of the interdependent web of all species. Yet the federal government cannot have the authority to regulate any activity affecting any person.

In fact, the Supreme Court has implicitly recognized this limit in *Lopez* and *Morrison*. In each case, the Court was reviewing a single provision of an omnibus bill to regulate crime.<sup>29</sup> The federal government cannot regulate noneconomic activity as part of a comprehensive scheme *to regulate crime* as this would not be necessary and proper to the regulation of commerce. Similarly, the federal government cannot rely on its conservation or environmental goals to expand beyond regulating commerce using the Necessary and Proper Clause.

## **District Court’s Groundbreaking Decision Holding the Regulation Unconstitutional**

On November 4, 2014, the District Court for the District of Utah struck down the Utah prairie dog regulation as unconstitutional.<sup>30</sup> It agreed with People for the Ethical Treatment of Property Owners—neither the Commerce Clause nor the Necessary and Proper Clause permits the federal government to assert authority to regulate anything that affects the environment. Judge Dee Benson explained “If Congress could use the Commerce Clause to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce), there would be no logical stopping point to congressional power under the Commerce Clause.” His opinion continued:

“Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce. Congress similarly lacks authority through the Necessary and Proper Clause because the regulation of takes of Utah prairie dogs is not essential or necessary to the [Endangered Species Act’s] economic scheme.”

This was the first time a federal court ever held that regulation under the Endangered Species Act exceeded the federal government’s authority. In every prior case to consider this question,<sup>31</sup> the courts upheld the regulation, though for conflicting reasons. The case is now on appeal to the Court of Appeals for the Tenth Circuit.<sup>32</sup>

### **Pacific Legal Foundation’s Environmental Project**

People for the Ethical Treatment of Property Owners is represented by PLF attorneys Jonathan Wood and M. Reed Hopper, with the assistance of local attorney Matt Munson. The organization is seeking no damages—only an injunction and declaration that the regulation exceeds the federal government’s constitutional authority.

PLF ([pacificlegal.org](http://pacificlegal.org) & [blog.pacificlegal.org](http://blog.pacificlegal.org)) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and has offices in Washington, Florida, and the District of Columbia. Its Environmental Project’s mission is to ensure that environmental laws do not violate constitutional rights or ignore the toll they take on people’s lives. Recently, it won an important victory in the U.S. Supreme Court guaranteeing property owners a right to challenge Clean Water Act orders forbidding them from using their property, on pain of \$75,000 per day in fines. That case is *Sackett v. Environmental Protection Agency*.<sup>33</sup>

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Notes:

1. *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service*, \_\_\_\_ F.Supp.3d \_\_\_\_, 2014 WL 5743294 (D. Utah Nov. 4, 2014), available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2014/11/PETPO-ruling.pdf>.
2. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).
3. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).
4. Alex Kozinski, *Introduction to Volume 19*, 19 Harv. J. L. Pub. Pol. 1, 5 (1995).
5. <http://www.petpo.org>.
6. 50 C.F.R. § 17.41(g).
7. 16 U.S.C. § 1532(19).
8. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-04 (1995).
9. Jim Wayner, *Approaching right whales will cost you, wildlife officials warn*, Florida Today (Mar. 12, 2014), available at <http://www.floridatoday.com/article/20140312/NEWS01/303120027/Approaching-right-whales-will-cost-you-wildlife-officials-warn>.
10. 16 U.S.C. § 1540(a), (b).
11. 49 Fed. Reg. 22330.
12. *Id.*
13. *Id.*
14. *Id.*
15. U.S. Const. art. I, § 8.
16. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

17. *See United States v. Lopez*, 514 U.S. 549, 585-93 (1995) (Thomas, J., concurring) (explaining that “commerce” was understood to refer to the selling and transportation of goods but did not include production and manufacturing); *see also* The Federalist No. 36.
18. 317 U.S. 111 (1942).
19. 514 U.S. 549 (1995).
20. 529 U.S. 598 (2000).
21. *See Gonzales v. Raich*, 545 U.S. 1 (2005) (defining “economic”).
22. Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377 (2005); John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174 (1998).
23. U.S Const. Art. I, sec. 8.
24. 17 U.S. (4 Wheat.) 316 (1819).
25. 545 U.S. 1 (2005).
26. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (federal government can prohibit racially-discriminatory economic activity with a substantial effect on interstate commerce for any reason); *Champion v. Ames*, 188 U.S. 321 (1903) (federal government can prohibit interstate commerce in lottery tickets based on moral opposition to gambling); *see also Hodel v. Indiana*, 452 U.S. 314, 329 (1981) (federal government can regulate mining to protect the environment).
27. *See Andrus v. Allard*, 444 U.S. 51 (1979).
28. *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003).
29. *See, e.g.*, Crime Control Act of 1990, P.L. 101-647, 104 Stat. 4789 (1990) (omnibus crime bill containing the misleadingly named Gun Free School Zones Act); Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, 108 Stat. 1796 (1994) (omnibus crime bill containing the Violence Against Women Act).
30. \_\_\_\_\_ F.Supp.3d \_\_\_\_\_, 2014 WL 5743294, *available at* <http://blog.pacificlegal.org/wp/wp-content/uploads/2014/11/PETPO-ruling.pdf>.

31. *San Luis & Delta-Mendota Water Authority v. Salazar*, 638 F.3d 1163 (9th Cir. 2011) (delta smelt); *Alabama-Tombigbee Rivers Coal. v. Kepthorne*, 477 F.3d 1250 (11th Cir. 2007) (Alabama sturgeon); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003) (cave bugs); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003) (arroyo toad); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (red wolf); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (Delhi sands flower-loving fly).

32. Case Nos. 14-4151, 14-4165.

33. 132 S. Ct. 1367.

